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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANIEL R. WOLSKI, Plaintiff and Appellant, v. FREMONT INVESTMENT & LOAN et al., Defendants and Respondents.	G033169 (Super. Ct. No. 03CC00112) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Lakeshore Law Center, Jeffrey Wilens; Law Offices of Jeffrey P. Spencer, Jeffrey P. Spencer; Law Offices of Michael F. Creamer and Michael F. Creamer for Plaintiff and Appellant.

Call, Jensen & Ferrell, Scott J. Ferrell, Elizabeth K. Penfil, Melinda Evans and Wayne W. Call for Defendants and Respondents.

* * *

In a case of first impression, we are asked to decide whether a yield spread premium (YSP) paid in connection with a residential mortgage loan is included in the definition of points and fees payable by a borrower at or before closing under the predatory lending law (Fin. Code, § 4970 et seq.; all further statutory references are to this code unless otherwise stated). In sustaining without leave to amend the demurrer of defendants Fremont Investment & Loan, Raymond Harold Cason, Jr., and First American Funding, Inc. to plaintiff Daniel R. Wolski's first amended complaint, the court held the YSP did not fall within that definition. Plaintiff contends this was error. We disagree and affirm.

FACTS

Defendant Fremont made a $185,000 residential mortgage loan to plaintiff; defendants First American and Cason acted as loan brokers. After plaintiff learned he could have obtained a loan with a lower and fixed interest rate, he filed this suit claiming violation of section 4970 et seq. and Business and Professions Code section 17200. He alleged the loan was a "covered loan" as defined by section 4970, subdivision (b)(1) because it was less than $250,000 and his total points and fees payable at closing exceeded six percent of the loan amount. Plaintiff alleged defendants breached various sections of the predatory lending law by failing to make certain disclosures and by including a prepayment penalty.

Defendants demurred, primarily on the grounds that the transaction did not violate the predatory lending law because it was not a covered loan. Total points and fees as alleged by plaintiff exceeded six percent only because he had erroneously included a $3,700 YSP in his calculations. Defendants claimed that under a proper reading of the statute, a YSP is not included in points and fees. They also argued that because there was no violation of the predatory lending law, the Business and Professions Code section

17200 cause of action failed for lack of a predicate offense. The court sustained the demurrer without leave to amend, ruling that the YSP was not included in the definition of points and fees and thus the loan was not a covered loan under the statute.

DISCUSSION

Section 4970, subdivision (b)(1)(B) provides that a loan is a covered loan and therefore subject to the terms of the statute, if "[t]he total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount." The parties agree total points and fees for the loan at issue here exceed 6 percent only if the YSP is included. Plaintiff argues it should be included; defendants contend it should not.

Foundational to our decision is an understanding of the nature of a YSP. One court has described it thus: "A Yield Spread Premium is a bonus paid to a broker when it originates a loan at an interest rate higher than the minimum interest rate approved by the lender for a particular loan. The lender then rewards the broker by paying it a percentage of the 'yield spread' (i.e., the difference between the interest rate specified by the lender and the actual interest rate set by the broker at the time of origination) multiplied by the amount of the loan. [Citation.]" (*In re Bell* (Bankr. E.D.Pa. 2004) 309 B.R. 139, 153, fn. 9; see also *Lane v. Residential Funding Corp.* (9th Cir. 2003) 323 F.3d 739, 743.) As alleged in the complaint, the lender pays the YSP to the broker at closing, and the borrower pays a higher interest rate over the life of the loan to compensate for the payment. (*O'Sullivan v. Countrywide Home Loans, Inc.* (5th Cir. 2003) 319 F.3d 732, 739; *In re Bell, supra,* 309 B.R. at p. 153; *In re Apgar* (Bankr. E.D.Pa. 2003) 291 B.R. 665, 675.)

Defendants maintain that since a YSP is not paid by the borrower, but by the lender, it does not fall within the statutory language of "[t]he total points and fees

payable *by the consumer* at or before closing." (§ 4970, subd. (b)(1)(B), italics added.) But plaintiff contends he pays the YSP in the form of higher interest. Defendants counter that, even assuming the statute can be construed in such a fashion, the YSP is not "payable . . . *at or before closing*." (§ 4970, subd. (b)(1)(B), italics added.) We agree.

In reviewing a statue, "'[w]e first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.' [Citation.] If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.' [Citation.]" (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 485.)

Here, the phrase "at or before closing" is plain and its meaning is clear. Contrary to plaintiff's suggestion, it does not include payments made after closing and over the life of the loan, such as interest. To interpret the language in that fashion would render the words "at or before closing" surplusage in violation of the rules of statutory construction. (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 757.) "'We cannot presume the Legislature . . . engaged in an idle act or enacted a superfluous statutory provision. [Citation.]' [Citation.] '"In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose . . . ." [Citations.]' [Citation.]" (*Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 122 Cal.App.4th 1467, 1479.)

Plaintiff argues that even though the increased interest is paid over the life of the loan, it is "payable" at or before close. He analogizes the increased interest to a consumer paying a charge with a credit card where, even though the bank, not the consumer, hands over the actual cash, the consumer is liable for reimbursing the bank for payment, plus interest. Thus, he claims, even though the YSP is not "paid" at or before closing, it is "payable" at that time.

But this is a strained and anomalous reading of the word "payable" in the context of the remaining language of the section. We may infer from the pleadings that all charges included in points and fees as disclosed by defendants were paid on or before closing. To construe the language to include one payment made over the life of the loan, when all others are paid at closing, would lead to an absurd consequence, in derogation of rules of statutory interpretation (*Sampson v. Parking Service 2000 Com. Inc.* (2004) 117 Cal.App.4th 212, 224), and improperly "rewrite the law to conform to an intention that has not been expressed. [Citation.]" (*Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 674.)

In applying section 4970, our function "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." (Code Civ. Proc., § 1858; *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 123.) If the Legislature had intended that all charges payable by a borrower were to be included in the calculation, it easily could have drafted the statute that way. We will not rewrite it to do so.

Plaintiff urges us to consider the legislative history of the statute, pointing to the evils the Legislature sought to cure, including "broker kickbacks." But the committee analysis of the bill after amendments made by the Senate reflects no discussion of broker kickbacks, although it did state one of its goals was to "[p]rohibit steering [a] consumer to a loan less favorable than warranted by [the] credit worthiness [*sic*] of [the] borrower." (Concurrence in Senate Amendments to Assem. Bill No. 489 (2001-2002 Reg. Sess.) Sep. 10, 2001, p. 3, at <http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0451-0500/ab_489_cfa_20010913_040022_asm_floor.html> [as of Nov. 18, 2004].) However, this stated purpose fails to support plaintiff's interpretation of the statute. Moreover, nothing in the legislative history or the record shows that failing to include a YSP in the definition of points and fees payable by a consumer at closing defeats the purpose of the predatory lending law.

Further, our "authority to investigate the intent of the Legislature is subject to the precondition that the statutory language in question be ambiguous, uncertain or unclear. Otherwise, the 'plain meaning rule' prevails, and the literal text of the statute must be respected without judicial construction or interpretation. [Citations.]" (*Kramer v. Intuit, Inc.* (2004) 121 Cal.App.4th 574, 578-579.)

In addition, plaintiff directs us to nothing in the legislative history that specifically deals with treatment of YSP's. Assembly and Senate committee reports reveal the Legislature investigated subprime lending and predatory lending practices and was aware of federal and other state statutes enacted to deal with these matters. (E.g., Assem. Com. on Appropriations, analysis of Assem. Bill No. 489 (2001-2002 Reg. Sess.) May 16, 2001, pp. 2-3, at <http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0451-0500/ab_489_cfa_20010514_162807_asm_comm.html> [as of Nov. 18, 2004]; Sen. Com. on Judiciary, analysis of Assem. Bill No. 489 (2001-2002 Reg. Sess.) Jul. 3, 2001, pp. 1-2, 5, 7, at <http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0451-0500/ab_489_cfa_20010705_ 105027_sen_comm.html> [as of Nov. 18, 2004].) "[I]t is a settled principle of statutory construction that a Legislature in legislating with regard to an industry or an activity must be regarded as having had in mind the actual conditions to which the act will apply; that is, the customs and usages of such industry or activity." (*Irvine Co. v. California Emp. Com.* (1946) 27 Cal.2d 570, 581.)

Thus, we may safely infer the Legislature was aware of the mechanics of YSP's and understood that they are paid by the lender with a concomitant higher interest owed by the borrower. Had it intended that a YSP be included as "points and fees payable by the consumer at or before closing" (§ 4970, subd. (b)(1)(B)), it would have included appropriate language.

Plaintiff acknowledged in the trial court he could not amend this cause of action, and we agree with that conclusion. Because the cause of action for violation of

Business and Professions Code section 17200 was predicated on the violation of the predatory lending law, it, too, must fail.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.